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December 6, 2013

### VIA ELECTRONIC FILING

Hon. Arlene R. Lindsay  
U. S. District Court  
Eastern District of New York  
100 Federal Plaza  
Central Islip, New York 11722

**Re: Next Millennium Realty, LLC et al. v. Adchem Corp., et al., 03-05985**

Dear Judge Lindsay:

Plaintiffs in the above-referenced matter hereby request a Rule 56.1 pre-motion conference. The following documents are enclosed: (1) Plaintiffs' Rule 56.1 Statement; (2) Defendants' Rule 56.1 Counter Statement of Fact; (3) Defendants Rule 56.1 Statement of Fact on their Cross Motion; (4) Plaintiffs' Rule 56 Counter Statement of Fact on the Cross Motion.

Plaintiffs are the owners ("Landlord") of 89 Frost Street in Westbury New York ("89 Frost"). Landlord never occupied, conducted operations or polluted 89 Frost. Between 1966 and 1976, Landlord leased 89 Frost to certain Defendants ("Tenants"). Tenants conducted operations at 89 Frost and between 1973 and 1976 subleased 89 Frost to a subtenant ("Subtenant"), without Landlords consent. It is undisputed that Subtenant was a major contributor of contamination at 89 Frost.

Pursuant to the legal standard enumerated by Second Circuit in Commander Oil v. Barlo, 215 F.3d 321 (2d Cir. 1999), Tenant is liable as a *de facto* owner under CERCLA for the actions of the Subtenant. Specifically, in Commander Oil, the Second Circuit established a non-exclusive list of factors to determine if a tenant has indicia of ownership. These non-exclusive factors include: (1) whether the lease is for an extensive term and admits of no rights in the owner to determine how the property is used; (2) whether the lease cannot be terminated by the owner before it expires by its terms; (3) whether the lessee has the right to sublet the property without notifying the owner; (4) whether the lessee is responsible for payment of all taxes, assessments, insurance, and operation and maintenance costs; and (5) whether the lessee is responsible for making all structural and other repairs. Commander Oil, at 330-31. In addition to these factors other factors demonstrating indicia of ownership may be considered by the Court.

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Despite Defendants' attempt to create issues of fact in this case, there are no material issues of fact in dispute on the terms contained in the lease. Simply put, the lease speaks for itself. There is no need for hired experts to interpret the lease and opine on legal issues. It is respectfully submitted that this is the Court's domain. The Court should analyze the lease, and its undisputed provisions, against the factors enumerated in Commander Oil and make a determination on ownership liability as a matter of law.

When the lease is analyzed, it is indisputable that: (1) the lease was for a term of 20 years and allowed Tenant to engage in all "general manufacturing purposes" not in violation of the zoning ordinance. (Lease Addendum at ¶ 15); (2) the lease could only terminate early upon the following limited circumstances: (a) Tenant's default; (b) Tenant's exercise of its purchase option; (c) the building is destroyed by fire; and (d) eminent domain (Lease at ¶¶ 5, 8, 47, 65); (3) Tenant had the right to assign or sublet the Property without Landlord's consent. (Id. at ¶ 34); (4) Tenant was responsible for payment of all taxes, assessments, insurance, and operation and maintenance costs; and (5) after the first two years of the lease (when the Landlord guaranty of the building it built expired) Tenant was responsible for all repairs of the building, and certain structural repairs not enumerated in the Lease as the responsibility of Landlord.

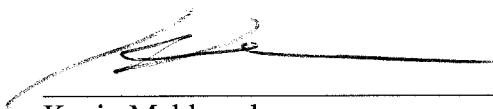
In addition to the five enumerated factors established in Commander Oil the lease provided other indicia of ownership to the Tenant, including: (1) Tenant had an option to purchase 89 Frost; (2) Tenant bore the risk of loss and Landlord was exempt from all liability; (3) Tenant had exclusive control and possession of the Property; (4) the lease/purchase agreement is considered a transfer of ownership interests under New York State tax law; (5) Tenant (not Landlord) profited from the Tenant's sublease to Subtenant; and (6) Tenant, not Landlord, was aware of Subtenants use of perchloroethylene ("PCE"), a major contaminant at 89 Frost.

When the lease is compared to the Commander Oil enumerated factors of indicia of ownership and additional indicia of ownership contained in the lease are considered by the Court, as a matter of law, Defendants have ownership liability under CERCLA.

Thank you for your consideration of this request for a pre-motion conference.

Enclosures  
cc: All Counsel of Record

Sincerely,

  
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Kevin Maldonado